

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

KEVIN M. ENGLING,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C03-4067-MWB

REPORT AND RECOMMENDATION

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I. INTRODUCTION

The plaintiff Kevin M. Engling (“Engling”) appeals a decision by an administrative law judge (“ALJ”) denying his application for Title XVI supplemental security income (“SSI”) and Title II disability insurance (“DI”) benefits. Engling argues the Record does not contain substantial evidence to support the ALJ’s decision. (*See* Doc. Nos. 9 & 14)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On May 8, 2001, Engling protectively filed applications for SSI and DI benefits, alleging a disability onset date of June 21, 2000. (R. 60-62¹) Engling alleged he was disabled due to Bipolar I disorder/manic depression. (R. 75) His application was denied initially on August 24, 2001 (R. 43, 45-48), and on reconsideration on February 14, 2002 (R. 44, 52-56). On February 27, 2002, Engling requested a hearing (R. 57), and a hearing was held before ALJ Andrew Palestini on November 27, 2002, in South Sioux City, Nebraska. (R. 317-55) Engling was represented at the hearing by non-attorney Lee Sturgeon. Engling, his mother Virginia Engling, and Vocational Expert (“VE”) Sandra Trudeau testified at the hearing.

On April 25, 2003, the ALJ ruled Engling was not entitled to benefits. (R. 11-26) On May 30, 2003, the Appeals Council of the Social Security Administration denied Engling’s request for review (R. 6-8), making the ALJ’s decision the final decision of the Commissioner.

¹These pages contain Engling’s application for DI benefits. His application for SSI benefits, the initial disability determination by the state agency, and the reconsideration disability determination are not included in the record. (*See* R. 1)

Engling filed a timely Complaint in this court on July 22, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 4) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Engling's claim. Engling filed a brief supporting his claim on November 20, 2003. (Doc. No. 9) The Commissioner filed a responsive brief on January 13, 2004. (Doc. No. 12). Engling filed a reply brief on January 20, 2004 (Doc. No. 14)

The Commissioner then filed a response to Engling's reply brief. There is no provision in the court's briefing schedule order for such a responsive brief (*see* Doc. No. 6, amended by Doc. No. 8), and the Commissioner did not seek leave to file a supplemental brief in this matter. Further, the Commissioner has not pointed to new court decisions since her initial brief; rather, she merely attempts to gain another "bite at the apple," reasserting arguments already made. Accordingly, the court finds the supplemental brief was not warranted, and will not consider the Commissioner's "Response to Plaintiff's Reply Brief."

The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Engling's claim for benefits.

B. Factual Background

1. Introductory facts and Engling's testimony

Engling was born on August 4, 1962. At the time of the hearing, he was living in Sioux City, Iowa. He graduated from high school, and then went into the Army where he was trained as a satellite communications technician. He was in the Army from March 1980 to April 1984. (R. 320-21) When he got out of the Army, he earned an associate's

degree in electronic engineering at Western Iowa Tech. He later took correspondence courses to refresh his skills, and he received some type of certificate in “[m]aintenance, electronics, electrical.” (R. 321-22)

Engling’s work history includes the following. In 2001, and a couple of times in 2002, he worked part-time as a model for college art classes. (*See* R. 101-02, 322-23) From January 1999 to June 2000, he worked as an electrician at a foundry, maintaining eight foundry furnaces and support equipment. (*See* R. 101, 104) From April 1997 to November 1998, he worked as an electrician on the construction of a soy bean plant, installing the conduit, wiring, and related equipment. (*See* R. 101, 105) From August 1997 to January 1998, he worked as a general maintenance man at a grocery store. (*See* R. 101, 106) From August 1996 to January 1997, he worked as an electrician at some type of manufacturing company (*see* R. 101, 107), and from February 1992 to December 1994, he worked as an electrician at an egg processing plant. (*See* R. 101) From August 1987 to December 1991, he worked as an electro-mechanical technician at an electronics company, and from April 1984 to August 1987, he worked for what appears to be a janitorial firm. (*See* R. 101)

Engling’s electrician and maintenance jobs are classified as medium to heavy, skilled jobs, and they were performed at the heavy level by Engling. (*See* R. 132, 104, 105, 107) The cleaning jobs are classified as heavy, unskilled jobs, and they were performed at the medium level by Engling. (*See* R. 132) His income increased from less than \$20,000 a year prior to 1999, to \$39,000 in 1999, and \$30,000 in 2000. He stated he was doing the same type of work but for different employers. (R. 341)

In March 2001, Engling got into a fistfight with his brother, and as a result, he voluntarily committed himself to the Cherokee Mental Health Institute (“CMHI”). (R. 323) Engling explained he has had a drinking problem since before he went into the

military. He has had problems with confusion, and an inability to concentrate and understand things, that led him to use and abuse both alcohol and marijuana for several years. He has not used alcohol, marijuana, or any other illegal drugs since he entered CMHI in March 2001. (R. 324-26) In addition, Engling experienced anxiety attacks prior to going to CMHI, but once his medication levels were adjusted properly, he quit having anxiety attacks. His last anxiety attack was three or four months prior to the ALJ hearing. (R. 339-40)

He has been receiving treatment from counselors and therapists since March 2001. He takes 2100 mg. of lithium and 20 mg. of Zyprexa daily. (R. 327) He sees a doctor or therapist about every six weeks. (R. 333) Engling stated that despite his abstinence from alcohol and other drugs, his ongoing therapy, and his medication regimen, his ability to concentrate and understand has not improved and remains about the same as before March 2001. (R. 326-27) He opined the therapy and medication “take[] the place of what [he] was using the drugs and alcohol for.” (R. 327)

Engling stated that prior to getting into treatment, he had thoughts of hurting himself and others. He would stalk people and get into fights. He used to plan how he would harm himself, and he stated that in 1993, he attempted to hang himself once, and he took overdoses of drugs twice. (R. 328) He intermittently has continued feelings of depression despite his medications. (*Id.*)

Engling opined he would be unable to do any of his past jobs. He stated his hands shake and are not steady enough to do the work. (R. 329-30) He has difficulty maintaining a train of thought and has memory problems, and he noted his mother helps him remember when to take his medications. He has no income and is totally dependent on his parents financially. If he were awarded benefits, he stated he probably would need help managing the funds. (R. 331-32) His driver’s license was revoked for nonpayment

of child support, but he felt he would be capable of driving if he had a license. (R. 338) However, he would not be able to drive at night when he is taking his medications, which make him sleepy. (R. 339)

Engling also noted that due to his inactivity since March 2001, his physical abilities have declined. He opined that if he were able to handle a full-time job mentally, he would have no problem being on his feet all day, but he could not sit all day. He did not believe he could lift the amounts of weight he had lifted in his prior jobs, but felt he could probably lift about forty pounds. (R. 337) He noted he has had problems with carpal tunnel syndrome, and the condition still “wakes him up at night,” even though he is not using his hands as much as when he was working. However, he stated he was not taking any medication for the condition. (R. 338) He tried to help his sister put a roof on her house in April 2002, but he fell off the roof due to his nervousness. The roofing job took a couple of months to complete. Because he could not stay up on the roof, he spent several hours a day helping out by picking things up, carrying shingles from the shed up to the roof, and getting nails. (R. 348-50)

As far as his daily activities, Engling stated his mother has made a written list of tasks he can do around the house and he tries to stick to the list. He stated there are “not too many jobs on there,” and they are simple jobs like vacuuming or putting things away. (R. 332) He likes to watch police shows on television, but he is unable to sit still for very long without getting “antsy,” so he will get up and walk around inside the house. (R. 333) He has difficulty concentrating through a long movie. (R. 335) He reads on occasion but does not recall what he reads. (R. 335)

Besides going to his doctor and therapist, Engling rarely leaves his house. He occasionally rides with his father to the grocery store, which he thought he had done about five times between March 2001 and November 2002. Historically, he had not gone out

to visit family or friends, or to engage in social activities. He explained he “just [didn’t] have the motivation.” (R. 334) He stated it helps his mood swings to stay home, where he feels safe from harming himself or others. (R. 336) A short time before the ALJ hearing, he began going to Friendship House, which is associated with Siouxland Mental Health Center, where he plays pool and drinks coffee. Engling stated he goes to Friendship House about once a week at around 3:00 or 4:00 in the afternoon, and stays for about an hour. Friendship House is eleven or twelve blocks from Engling’s home, and he gets a ride with his social worker or his mother. (*Id.*; R. 350-51)

Engling noted the only thing that “bugs” him is his brother’s dog, which barks all the time. When he becomes irritated at the dog, he will tell himself “it’ll be all right, don’t worry about it.” (*Id.*)

Engling stated his therapy is ongoing, and none of his doctors or therapists have talked to him about the course of his future treatment or his prognosis. (R. 341)

2. *Virginia Engling’s testimony*

Engling’s mother, Virginia Engling, stated Engling had been living with his parents for about two years at the time of the hearing. Also living in the home are Engling’s handicapped brother Allen, and two other brothers. (R. 343-44) Mrs. Engling is not employed outside the home and has an opportunity to observe Engling on a daily basis. She stated she has to remind Engling to take his medications twice a day; she reminds him to eat; she sometimes has to tell him what day of the week it is; and she reminds him of all of his doctors’ appointments. (R. 344) She confirmed that Engling rarely leaves the house, but he had started going to Friendship House on occasion.

Since Engling’s release from CMHI, Mrs. Engling has not seen him use any alcohol or other drugs except his prescribed medications. She has observed that Engling has

trouble remembering things, and she opined he only remembers about 40%. (R. 345) She stated his memory had gotten “considerably worse” over the previous year-and-a-half. She observed that he has good days and bad days, with the bad days occurring three or four times a week. She opined that on his bad days, he would be incapable of performing any type of work for an eight-hour day. (R. 345-45) Even on his good days, Mrs. Engling thought Engling would be unable to return to his former work. (R. 346) She stated his medications keep him “level most of the time,” but at a “low level of ability.” (*Id.*)

Mrs. Engling stated that after she had surgery, Engling helped her get up and down out of a chair, and he sat with her in the living room for six or seven hours a day to help her because she had problems with her arm. (R. 347)

3. *Engling’s medical history*

The record indicates Engling began seeking mental health care as far back as December 1993, when he was having marital difficulties. (R. 137-41) He was hospitalized for nine days because he was suicidal and depressed. Three days after his release, he again was hospitalized due to suicidal feelings and his parents’ concern that he might hurt himself or others. (R. 142-52) His diagnosis upon admission to the hospital was major depression, recurrent, moderately severe, without psychotic features, and dysthymia. At discharge, his diagnosis had changed to Bipolar Disorder and depression. Doctors prescribed Elavil, Zoloft, Lithium carbonate, and Erytab. (*Id.*)

Engling was hospitalized again on January 25, 1994, after taking an overdose of Amitriptyline at work. He was in intensive care for two days, and then refused to enter the locked psychiatric unit, stating he would cooperate with nurses in the open unit. Doctors noted he needed continued inpatient care for an episode of major affective disorder. (R. 153-59) He remained hospitalized until February 11, 1994. Although he

had begun to improve initially, he regressed into suicidal thoughts, and he was transferred to Cherokee Mental Health Institute (“CMHI”) for further treatment. (R. 160-67)

On February 18, 1994, Engling was hospitalized again on an emergency hold order after he took an overdose of medications including Tegretol, Zoloft, and Mellaril. At the time of admission, he appeared to understand his condition and agreed he needed treatment. He was no longer suicidal “but was very unhappy,” and reported he had decided not to contest his divorce. (R. 169) Ten days later, he was reportedly angry and he was treated with psychotherapy but no medication. (R. 168) By March 9, 1994, he had tried to hang himself. Doctors’ notes indicate, “He had serious burns on the side of his neck and when he fell he hit his head and bled. He continued to deny all problems.” (R. 169) He responded poorly to treatment and was transferred to a secured unit for continued inpatient treatment. His prognosis was considered to be very poor. (*Id.*; *see* R. 168-87) He apparently spent five months in inpatient treatment. (*See* R. 197)

The record contains no further evidence of Engling’s mental health treatment until March 21, 2001, when he voluntarily admitted himself to CMHI after getting into a fight with his brother. (*See* R. 195-205) He reported mood swings and depression for the preceding nine months, including homicidal and suicidal thoughts and bizarre thinking. Among other things, he stated he identified with boys who have carried out school shootings, he had “considered getting nuclear warheads and blowing up the earth,” and he had thought about “shooting people as they drive by.” (R. 197) Engling told doctors he quit taking his medication soon after he was released from inpatient treatment in 1994, and resumed using marijuana, which he continued to use. (*Id.*) He stated he had “walked

off a \$60,000 job as an electrician at PMX Industries in Cedar Rapids, Iowa in June of 2000,” and his life had been increasingly unstable since that time. (*Id.*)²

Engling remained at CMHI until April 5, 2001. He was treated with psychotherapy; educational classes regarding Bipolar Disorder, substance abuse, and mental illness; and medications including Lithobid, Ativan, and Ambien. His discharge diagnoses included Bipolar I Disorder, Current Episode Mixed; Cannabis Abuse; Antisocial Personality Traits; and a GAF of 50, indicating his symptoms were still considered to be serious. (R. 195; see American Psychiatric Assoc., *Diagnostic & Statistical Manual of Mental Disorders (DSM)* 25-30 (4th ed. 1994)). He was referred to Siouxland Mental Health Center (“SMHC”) for medication supervision and assistance, and individual therapy. (R. 195)

Engling had an intake evaluation at SMHC on April 12, 2001, performed by nurse-practitioner Judy Buss. (R. 207-10) At the interview, Engling rated the severity of his depression at 10 on a scale of 1 to 10. He described severe sleep disturbances for the preceding five years. He described odd thoughts such as feeling he had an alien in his body, and being “over involved with germs,” and he stated he considered Timothy McVey to be a hero. Engling indicated a desire to stabilize his mood swings and he agreed to take Lithium. Ms. Buss did not believe Engling was a threat to himself or others at that time. She reviewed her findings with Ronald W. Brinck, M.D., who concurred in Ms. Buss’s recommended therapy. Engling was told to continue taking 900 mg. of Lithium twice daily and 10 mg. of Ambien at night, and Ms. Buss added 5 mg. of Zyprexa at bedtime to his medication regimen. (R. 207)

²Engling’s leaving his job in June of 2000 is significant in that it coincides with his alleged disability onset date.

On April 16, 2001, Engling reported he felt better, he was controlling his temper better, and the medication was working. Ms. Buss noted he was hyper verbal. (R. 255) On May 10, 2001, he was still hyper verbal and stated he was a little anxious at times. He was avoiding small arguments with family members by walking away from the situation. His sleep was improved. (R. 254) On June 7, 2001, Engling reported he was less argumentative, a fact that his family had noticed. He continued to be hyper verbal. (R. 251) On July 5, 2001, Engling stated his communication with his daughter had improved. His Lithium dosage was increased to add 300 mg. at 4:00 p.m. (R. 250) On July 19, 2001, Engling stated he had gone out with friends one evening and had a good time. He noted he had not socialized for a long time. (R. 249)

Herbert L. Notch, Ph.D. completed a Psychiatric Review Technique for the period June 20, 2000, through August 9, 2001, and a concurrent Residual Functional Capacity ("RFC") Assessment. (R. 211-30) He found Engling's Bipolar Disorder to be a severe, medically-determinable mental impairment. He found Engling to have a moderate degree of limitation in his activities of daily living, ability to maintain social functioning, and ability to maintain concentration, persistence or pace, but he did not find any of these restrictions to be significant. He noted Engling had experienced one or two repeated episodes of decompensation, each of extended duration. (R. 211-24) In assessing Engling's RFC, Dr. Notch found him to be moderately limited in his ability to carry out detailed instructions, maintain attention and concentration for extended periods, work in coordination with or proximity to others without being distracted by them, complete a normal workday and workweek without interruptions from psychologically-based symptoms, perform at a consistent pace without an unreasonable number and length of rest periods, accept instructions and respond appropriately to criticism from supervisors, and get along with coworkers or peers without distracting them or exhibiting behavioral

extremes. Otherwise, he found Engling to have no limitations on his functional abilities. (R. 225-28)

Dr. Notch found Engling's allegations to be credible and assessed his current GAF at 40, which would indicate "some impairment in reality testing or communication or major impairment in several areas such as work, family relations, and judgment." *Bartrom v. Apfel*, 234 F.3d 1272 (Table), 2000 WL 1412777, at *1 n.3 (7th Cir. Sept. 20, 2000). Nevertheless, he opined Engling could "perform work-like activities on at least a simple routine basis." (R. 229-30)

Engling continued to see Judy Buss for regular medication follow-up. On September 13, 2001, he reported he was able to state his opinions to his family without becoming irritable and angry. (R. 247) On October 16, 2001, he reported he was doing well, and noted he and his family had attended a seminar on Bipolar illness. (R. 246)

On October 29, 2001, Engling began seeing licensed social worker Gary E. Lewis at SMHC for individual therapy to deal with his feelings of depression. He was living with his parents and felt he was unable to work. Engling saw Mr. Lewis for therapy sessions on November 5 and 19, and December 3, 17, and 31, 2001; and on January 8 and 22, February 5 and 19, March 19, April 1 and 15, June 3, July 15, August 26, September 23, October 23, and November 11, 2002. When he began therapy in November 2001, Engling reported he was not taking his medications regularly and was only showering once a week. He was depressed and lethargic and was sleeping too much. (R. 241) Over the next several sessions, he discussed unresolved issues relating to his divorce and his illness, and considered suggestions to help him remember to take his medications timely each day. Mr. Lewis's notes indicate Engling remained in partial remission from his Bipolar Disorder, but he still struggled with unresolved issues. At one point, he reported

sleepwalking and expressed concern that he might hurt someone. (R. 289) He remained compliant with his medication regimen and treatment. (R. 288)

At an appointment with Mr. Lewis on February 5, 2002, Engling expressed growing impatience “waiting for disability to come through.” (R. 287) He stated he had quit smoking ten days previously. Mr. Lewis noted Engling was depressed and agitated. (*Id.*) On February 19, 2002, Engling reported feeling overwhelmed by current world events. (R. 286) On March 19, 2002, he appeared more depressed, and expressed confusion about how to proceed with getting food stamps, and about working with his attorney on his disability case. (R. 285) On April 1, 2002, he reported occasional crying spells since his divorce, and noted he had stayed off tobacco for three months. (R. 284) On April 15, 2002, Engling described helping his brothers do a roofing job for his sister. He complained that he could not keep up with his brothers on the job. Mr. Lewis noted Engling was not depressed at that time, but Engling’s mother was concerned that he might become suicidal if he missed taking his medications. (R. 283)

At his appointment on June 3, 2002, Engling stated he did not feel like doing anything and was staying in the house most of the time. Mr. Lewis noted Engling was moderately depressed. (R. 282) At his medication check on June 5, 2002, Ms. Buss increased his Zyprexa dosage. (R. 281) On July 15, 2002, Engling reported he had not gotten food stamps and he was having problems with concentration and not sleeping. He would stay up until 3:00 or 4:00 a.m. and then sleep past noon. Mr. Lewis noted Engling felt more positive and focused by the end of the session, but he should have continued intervention to remain in partial remission. (R. 280)

On August 26, 2002, Engling reported having no energy, staying in bed until noon, and watching television much of the time. He stated his driver’s license had been revoked for nonpayment of child support, noting he was \$9,000 behind in payments because he had

been unable to work for five years. He stated could not concentrate, and Mr. Lewis noted it “appear[ed] nearly impossible for him to follow[] through on getting food stamps and working with attorneys re: his SSD[.]” (R. 309) His affect was flat and he exhibited a retiring attitude. He appeared lethargic, and Mr. Lewis noted he might be over-medicated (*id.*); however, Ms. Buss continued Engling’s current medications without change at his next appointment. (R. 308)

Mr. Lewis arranged for another social worker to assist Engling in applying for food stamps. Jill Barr, LBSW, met with Engling in September 2002, for that purpose, and she also recommended he begin going to Friendship House. (R. 306) At Engling’s next therapy session, Mr. Lewis noted Engling was less depressed but was still feeling helpless, lethargic, and unmotivated. (R. 307) On October 23, 2002, Engling stated he thought his medications were working well and he liked working with Ms. Barr. Mr. Lewis noted Engling was “stabilized but in partial remission, not able to follow[] through in daily affairs, not able to work.” (R. 302) Engling toured Friendship House on October 24, 2002, with Ms. Barr, and he was approved for membership on November 7, 2002. He indicated he planned to go to Friendship House several times a week. (R. 300, 301)

Mr. Lewis completed a Medical Source Statement on November 11, 2002, in which he rated Engling’s mental abilities to sustain full-time, unskilled work. Mr. Lewis rated the following abilities as “fair,” defined on the form as: “Substantial loss of ability to perform the named activity in regular, competitive employment and, at best, could do so only in a sheltered work setting where special considerations and attention are provided”: remember work-like procedures, understand and remember very short and simple instructions, maintain regular attendance and be punctual within customary tolerances, work in coordination with or proximity to others without being unduly distracted by them, make simple work-related decisions, accept instructions and respond appropriately to

criticism from supervisors, get along with coworkers or peers without unduly distracting them or exhibiting behavioral extremes, respond appropriately to changes in a routine work setting, and be aware of normal hazards and take appropriate precautions. (R. 295-96)

Mr. Lewis rated the following abilities as “poor/none,” defined on the form as: “Complete loss of ability to perform the named activity in regular, competitive employment and in a sheltered work setting; could only do so to meet basic needs at home”: carry out very short and simple instructions, maintain attention for extended periods of two-hour segments, sustain ordinary routine without special supervision, and complete a normal workday and workweek without interruption from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods, which requirements are usually strict. (*Id.*) He rated as “good” Engling’s ability to ask simple questions or request assistance. (R. 296)

Mr. Lewis added the following handwritten notation to explain his assessment of Engling’s mental functional capacity: “This [patient] is clearly unable to function as indicated due to his Bipolar Illness.” (*Id.*) He indicated Engling’s condition had existed and persisted since at least June 21, 2000, and he opined Engling would be unable to manage benefits on his own. (*Id.*) He listed Engling’s symptoms from his Bipolar Disorder as follows: “Anhedonia or pervasive loss of interest in almost all activities; Sleep Disturbance; Psychomotor agitation or retardation; Decreased energy; Feelings of guilt or worthlessness; Difficulty concentrating or thinking.” (R. 297) He indicated Engling’s mental impairment caused marked restriction of the activities of daily living and difficulties in maintaining social functioning; he often would experience deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner, in work settings or elsewhere; and he had experienced “continual” past episodes of deterioration or decompensation in work or work-like settings that caused him to withdraw from the

situation or experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors). (*Id.*)

Subsequent to the ALJ hearing, Michael P. Baker, Ph.D. saw Engling on February 7, 2003, for a psychodiagnostic mental status examination and some testing at the request of Disability Determination Services. (R. 310-15) Dr. Baker noted Engling was cooperative during testing and appeared to give his best effort. (R. 313) Test results revealed no memory impairment. On the MMPI, his depression scale was “significantly elevated,” but not the manic scale. (R. 314) Although Dr. Baker found Engling was forthright, the MMPI validity scale suggested possible exaggeration of symptoms and of Engling’s negative self-appraisal. Dr. Baker discussed at length the behavioral characteristics often found in individuals with similar validity scales, including, among other things, emotional inappropriateness, irritability and moodiness, and unpredictable and nonconformist behaviors. (*See id.*)

Dr. Baker reached the following conclusions regarding Engling’s mental status:

Mr. Engling is an individual who has been diagnosed with Bipolar I Disorder with mixed episodes over a number of years. Presently, medication is lessening the fluctuation of mood. He remains at considerable risk for symptom development. Memory testing indicates a lack of problems.

The MMPI-2 is consistent with speculated anti-social personality. He would appear to be capable of handling cash benefits. In regards to mental limitation in work related activities, Mr. Engling appears capable of remembering and understanding instructions, procedures and locations. Carrying out instructions would not seem problematic in regards to maintaining attention, concentration and pace except for reported depressive and lethargic difficulties. He interacted appropriately with this evaluator, though past difficulties have certainly existed in interpersonal situations. His present emotional state

with adequate medication treatment does not suggest that this would be significantly problematic. Under stressful conditions and without adherence to medication regimen, as well as with the possibility of relapse regarding mood altering substance use, judgement and responding appropriately in the work place could be impaired.

(R. 314-15) Dr. Baker assessed Engling's current GAF at 55, which would indicate "at least moderate symptoms or moderate difficulty in [psychological], occupational, or social functioning." *Vargas v. Lambert*, 159 F.3d 1161, 1164 (9th Cir. 1998) (citing *DSM-III*, 1983 ed., at 20).

In addition to Engling's mental health treatment, discussed above, Engling also reported intermittent physical problems. On December 17, 2001, at his medication check, Engling told Ms. Buss he was having anxiety attacks about once a week, during which he experienced a sharp pain in his chest, radiating up into his neck. (R. 290) He was seen by a doctor at Siouxland Community Health Center for evaluation. Engling reported smoking half a pack of cigarettes a day. He was given some nitroglycerine, and was scheduled for evaluation of his chest pain. (R. 274-76, 278) There is no indication that he was diagnosed with any type of significant heart problems, and it appears his chest pain remained idiopathic.

He later was diagnosed with mild carpal tunnel syndrome bilaterally, and mild degenerative joint disease of his knees, but in February 2002, J.D. Wilson, M.D. found these impairments did not meet Listing severity, and noted there was little support for Engling's physical allegations of disability. (R. 270) Dr. Wilson found Engling could lift/carry fifty pounds occasionally and twenty-five pounds frequently, and stand/walk/sit, with normal breaks, for up to six hours in an eight-hour workday. He found Engling to have no other exertional, postural, visual, communicative, or environmental limitations,

although he did note Engling should avoid constant, repetitive gripping and grasping. (R. 262-69) Engling also reportedly experienced a left arm and shoulder strain in February 2002, that appears to have resolved. (*See* R. 271-73) The court finds none of these physical impairments to be disabling, and in any event, Engling has not alleged disability based on these conditions.

4. *Vocational expert's testimony*

The ALJ asked VE Sandra Trudeau the following hypothetical question:

I'd like the Vocational Expert to initially consider what effect it would have on the claimant's ability to perform activity if he was limited to simple, routine, repetitive work. Work that required no more than superficial interaction with coworkers to complete tasks. Work should not involve interaction with the public. Work should not be stressful, such as not fast paced, not have to handle emergency situations or customer complaints. And no need to remember details or information to perform duties. With those limitations, could he return to any of the past relevant work?

(R. 352) The VE responded that the hypothetical claimant would not be able to return to any of his past relevant work. (R. 353)

However, considering the claimant to be a younger individual with a high school education and some additional training, the VE stated there would be unskilled work he could perform, including "[a]dministrative support occupation, sedentary"; "cleaner, . . . light"; "sorter, . . . light"; and "order filler," in sedentary, light, and medium levels. (*Id.*)

The ALJ then asked if it would affect the VE's response if the claimant "would frequently fail to complete tasks [because of] impaired concentration, attention, working

at a slow pace and impaired memory.” (*Id.*) With those parameters, the VE stated the claimant “would not be able to sustain that work.” (*Id.*)

5. *The ALJ’s opinion*

The ALJ found Engling has not engaged in substantial gainful work activity since his alleged onset date of June 21, 2000. He found Engling has medically-determinable impairments of “bipolar disorder by history and bilateral carpal tunnel syndrome,” which impose more than slight limitations on his ability to function. (R. 24) However, he found Engling’s impairments do not meet the Listing criteria. In so finding, the ALJ noted he had “considered” Mr. Lewis’s evaluation of Engling’s mental limitations, which, if given substantial weight, would meet the listing level limitations. (*See* R. 19) However, he noted Dr. Baker’s mental function testing indicated Engling’s memory, and his attention and concentration, were in the average to superior range, which contradicts Mr. Lewis’s conclusions. (*Id.*) The ALJ further noted:

There is an indication that the claimant spends time at home with all his brothers and does go out if his mother needs something. He also goes to the Community Center once a week according to his mother’s testimony. These are not the typical activities of an individual with the limitations in activities of daily living and in social function in the marked range as assessed by his social worker.

(*Id.*) The ALJ further accorded “little weight” to Mr. Lewis’s opinions “because he is not an accepted medical source” as defined in the Regulations, while the consulting psychologist “is an accepted medical source for determining whether an individual has a medically determinable impairment.” (*Id.*)

The ALJ found Engling retains the RFC to “perform simple, routine work, requiring no more than superficial interaction with coworkers to complete tasks; no

interaction with the public; no stressful work, such as fast paced or the requirement to handle emergencies or customer complaints; and does not need to remember details or information to perform duties.” (R. 25) Based on the RFC determined by the ALJ, he concluded Engling cannot return to his past relevant work as an electrician, commercial cleaner, or industrial maintenance repairer. However, the ALJ found Engling “can perform a significant number of occupations that exist in his regional economy in spite of his medically determinable impairments.” (R. 25) As examples, the ALJ cited administrative support, cleaner, sorter, and order filler. (R. 24)

The ALJ found the testimony of Engling and his mother not to be credible “insofar as it attempted to establish total disability.” (R. 25) As support for this conclusion, the ALJ acknowledged that Engling’s “medically determinable impairments could reasonably be expected to produce the type of symptoms, i.e., depressed feelings, memory problems, and anxiety attacks, described during the course of his testimony.” (R. 22) However, he further found, “The objective medical evidence does not support the severity of the claimant’s alleged symptoms. His alleged memory problems are not consistent with the results of memory testing in which at the worst the claimant achieved an average score and at best in the superior range. These are simply not the findings one would expect from an individual with severe and disabling memory problems.” (*Id.*)

The ALJ observed that when Engling “maintains his medication regimen he has very good results with functional abilities that are very good.” (*Id.*) He noted Mr. Lewis reported several times that Engling was in “fairly good remission from the hard symptoms of his illness.” (*Id.*) The ALJ noted Engling reported spending four and one-half months in military jail on three charges of sexual assault before his Bad Conduct Discharge after four years in the Army. (R. 16) The ALJ found this fact lessened Engling’s credibility, as well as “the fact that he was divorced after numerous affairs, and the loss of his driver’s

license because he failed to make child support payments . . . [and the fact that he] lost his job because he abused drugs and alcohol.” (R. 23)

With regard to the testimony of Engling’s mother, the ALJ found as follows:

[S]uch testimony is not entitled to significant weight for the following reasons. First, as discussed earlier in this decision, it has been found that, with regard to allegations of total incapacity, the claimant himself lacked credibility, and it is clear that much of what Ms. Engling had to say about the claimant’s medical condition was nothing more than a recitation of those same allegations. Finally, the witness has some pecuniary interest in the outcome of this case as she has been supporting the claimant by providing food and shelter, in fact most living expenses for at least the last year and a half. As such she may be somewhat biased in her opinion as to the functional ability of her son.

(*Id.*)

Based on the above conclusions, the ALJ found Engling was not disabled, and was not eligible for SSI or DI benefits. (R. 25)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . .

in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant’s work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” . . . Such abilities and aptitudes include “[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling”; “[c]apacities for seeing, hearing, and speaking”; “[u]nderstanding, carrying out and remembering simple instructions”; “[u]se of judgment”; “[r]esponding appropriately to supervision, co-workers, and usual work situations”; and “[d]ealing with changes in a routine work setting.”

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the

presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon, supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26,

2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the

Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . .”). Under this standard, “[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner’s conclusion.” *Krogmeier, id.*; *Weiler, id.*; accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence “on the record as a whole” requires consideration of the record in its entirety, taking into account both “evidence that detracts from the Commissioner’s decision as well as evidence that supports it.” *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must “search the record for evidence contradicting the [Commissioner’s] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial.” *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline, supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not “reweigh the evidence presented to the ALJ,” *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or “review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188

(8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); accord *Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; see *Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ’s determination that a claimant’s subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ’s credibility determinations are entitled to considerable weight. See, e.g., *Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant’s subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. See

Hinchey v. Shalala, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Engling argues the ALJ improperly discounted the opinions of therapist Gary Lewis at the third and fourth steps of the sequential evaluation process, improperly obtained a post-hearing consultative examination before seeking additional information from SMHC, and erred in assessing Engling's RFC. (*See* Doc. No. 9) The Commissioner disagrees on each of these points. (*See* Doc. No. 12)

The court agrees that the ALJ failed to accord proper weight to Mr. Lewis's opinions, and improperly relied on Dr. Baker's consultative opinion. The ALJ correctly noted Mr. Lewis is not an acceptable medical source for purposes of establishing whether an individual has a medically-determinable impairment, while Dr. Baker is such a source. *See* 20 C.F.R. § 404.1513(a). However, at the point where the ALJ discounted

Mr. Lewis's opinion, the ALJ had already determined, in step two of the sequential evaluation process, that Engling had medically-determinable impairments of "bipolar disorder by history and bilateral carpal tunnel syndrome." (R. 18) The point at which the ALJ discounted Mr. Lewis's opinions was at step three, in determining the severity of Engling's impairment. (*See* R. 19) The Regulations specifically provide that opinions from "other" medical sources, such as therapists, are "appropriate sources of evidence regarding the severity of a claimant's impairment, and the effect of the impairment on a claimant's ability to work." *Shontos v. Barnhart*, 328 F.3d 418, 426 (8th Cir. 2003) (citing 20 C.F.R. § 404.1513(d)(1)).

In *Shontos*, the court held, "The amount of weight given to a medical opinion is to be governed by a number of factors including the examining relationship, the treatment relationship, consistency, specialization, and other factors. Generally, more weight is given to opinions of sources who have treated a claimant, and to those who are treating sources." *Id.* (citing 20 C.F.R. § 404.1527(d)). Mr. Lewis is not a "treating source," as defined in 20 U.S.C. § 404.1502, but he is a source who has treated the claimant. Furthermore, he has seen Engling "a number of times and long enough to have obtained a longitudinal picture of [his] impairment," and therefore his opinion is entitled to more weight than that of Dr. Baker, who is a nontreating source. *Id.*

The court also finds persuasive Engling's argument that given the fluctuating nature of bipolar disease, there is no way to tell whether Engling's performance on the one-time testing performed by Dr. Baker accurately predicted his ability to function in a work setting over time. *See Hutsell v. Massanari*, 259 F.3d 707, 711 (8th Cir. 2001); Doc. No. 9, pp. 7-8.

Further, Mr. Lewis's treatment records and opinion of the severity of Engling's impairment are consistent with Engling's subjective complaints, which the court finds to

be credible. The court finds it was inappropriate for the ALJ to rely, in making his credibility determination, on the events surrounding Engling's military discharge, which occurred nearly twenty years before the ALJ hearing, or on the loss of Engling's driver's license for nonpayment of child support. Engling explained he had failed to make child support payments because he had been unable to work for several years due to his mental health condition.³

The court finds it significant that even the consulting experts found Engling to be truthful and his allegations to be both credible and consistent with the record evidence. None of Engling's treating mental health providers have indicated he was malingering or untruthful at any time. The court finds the record contains substantial, consistent evidence to support Engling's claim that he is disabled due to a bipolar disorder.

As the ALJ recognized, taking Mr. Lewis's opinion regarding the severity of Engling's impairment as true, the VE's testimony supports the conclusion that Engling would be unable to sustain gainful employment, and therefore, he is disabled.

Of note, however, is the fact that the record lacks substantial evidence to support a conclusion that Engling has been disabled since June 2000. Although it appears he left his last job as an electrician in June 2000, he did not seek any type of mental health treatment until March 21, 2001, when he checked himself into CMHI. The record contains no evidence whatsoever regarding his mental health condition from the time he left that job until March 2001. The court therefore finds Engling's disability onset date to be March 21, 2001, rather than June 21, 2000, as alleged.

³ Although the court has not made an exhaustive search of the record for this purpose, the court further recalls no evidence to support the ALJ's statements that Engling's marriage dissolved after he was involved in "numerous affairs," or that Engling "lost his job because he abused drugs and alcohol." (*See* R. 23)

V. CONCLUSION

The court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); accord *Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). In this case, the court finds the ALJ's decision should be reversed, and this case should be remanded for calculation and award of benefits.

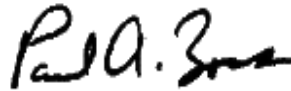
Therefore, for the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections⁴ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's

⁴Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

decision be reversed, and this case be remanded for calculation and award of benefits from and after March 21, 2001.⁵

IT IS SO ORDERED.

DATED this 28th day of May, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁵ If the district court adopts this Report and Recommendation, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.